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NO. 99730-6

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

PALLA SUM,

Petitioner.

Pierce County Superior Court Cause No. 19-1-01329-1
Court of Appeals Cause No. 53924-1-II

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

It is well-established that a person is not seized merely because a uniformed police officer approaches that person's parked vehicle, engages him in conversation, and asks for identification. That is what happened in Palla Sum's case. A police officer observed Sum slumped over in the driver's seat of a parked vehicle. The officer approached Sum's vehicle on foot, checked on his well-being, asked him questions, and requested identification. Sum argues he was seized because the officer suspected criminal activity, but this Court has said that an officer's subjective suspicions of criminal activity are irrelevant to whether a seizure occurred. Sum was not seized. This was a lawful social contact.

The Court of Appeals properly concluded that Sum was not seized when he provided the officer a false name and date of birth in response to the officer's request for identification. The Court of Appeals' decision neither raises a significant question of constitutional law nor involves an issue of substantial public

interest. Sum agrees this Court need not adopt a new reasonable “person of color” standard to resolve his case. This Court should therefore deny review under RAP 13.4(b)(3) and (4).

II. RESTATEMENT OF THE ISSUES

- A. This Court has repeatedly held that an individual is not seized merely because a police officer engages him in conversation in a public place and asks for identification. Should this Court deny review where the Court of Appeals properly concluded that no seizure occurred when a deputy approached Sum’s parked vehicle on foot, engaged him in conversation, and asked for his name?
- B. A reviewing court should not decide a constitutional issue unless it is absolutely necessary to the determination of the case. Should this Court deny review where Sum agrees that adopting a new reasonable “person of color” standard is unnecessary in determining whether a seizure occurred in his case?

III. STATEMENT OF THE CASE

Palla Sum was slumped over in the driver’s seat of a parked vehicle when Pierce County Sheriff’s Deputy Mark Rickerson walked over to check on his welfare. 2RP 9, 17-22.¹

¹ For consistency, the State will refer to the verbatim reports of proceedings in the same manner as Sum. *See* Petition for Review at 1 n.1.

Deputy Rickerson was on patrol in his unmarked vehicle at approximately 9:15 in the morning when he observed a Honda parked near a church. 2RP 10-13, 16-17. The deputy was driving through that particular area because stolen vehicles had previously been recovered there. 2RP 12-13, 17. Months earlier, a citizen who lived across the street from the church had contacted Deputy Rickerson about suspicious vehicles parked in the neighborhood. 2RP 13, 17. On this day, there appeared to be an individual slumped over in the driver's seat of the Honda. 2RP 17-18.

Deputy Rickerson parked his vehicle approximately 10-15 feet away so as to not block the Honda. 2RP 19. He did not know if the person inside the Honda needed medical aid or was under the influence of narcotics. 2RP 20. He decided to check on the vehicle, explaining, "So, at this point, I was just doing a social contact on the vehicle to see...why it was there." 2RP 20.

The deputy ran the Honda through his mobile computer to see who it was registered to and if it had been reported stolen.

2RP 20. The return showed a report of sale from Oregon. 2RP 20-21. The deputy, wearing a department issued uniform, walked up to the driver's window and saw there were two individuals inside. 2RP 21. Both appeared to be unconscious and did not seem to notice the deputy as he approached. 2RP 22. The deputy knocked on the driver's window to make sure the occupants were okay and to see what they were doing there. 2RP 22.

The individual in the driver's seat, later identified as Sum, slowly woke up and looked at the deputy. 2RP 22-23. Sum partially rolled down his window, and the deputy asked him what they were doing in the area. 2RP 23. The deputy did not have his weapon drawn during this contact. 2RP 23. Sum responded that they were waiting for a friend they were visiting across the street. 2RP 23. Sum appeared to be referring to the house of the citizen who had previously contacted Deputy Rickerson about problem vehicles in the neighborhood. 2RP 23.

Deputy Rickerson asked Sum if the vehicle belonged to him, and Sum said "no." 2RP 25. When the deputy asked who

the vehicle belonged to, Sum responded with a first name and gave no other information. 2RP 25. Deputy Rickerson then asked if Sum and his passenger had any identification on them that he could see. 2RP 23, 25. Sum asked the deputy why he was asking for their identification, and the deputy explained that Sum could not tell him exactly who the vehicle belonged to, and it was in an area where police had previously recovered stolen vehicles. 2RP 26.

Sum verbally provided a false name and date of birth. 2RP 26-27. Deputy Rickerson asked if they had been arrested before so that he could confirm their identities through booking photos, and later the deputy could not recall if Sum responded. 2RP 27.

Deputy Rickerson returned to his vehicle and sat with the door open to run their names. 2RP 27-28. He then heard the Honda's engine start. 2RP 28. The Honda quickly backed up and took off at a high rate of speed, driving over grass and the sidewalk as it did so. 2RP 28-29. Deputy Rickerson immediately turned on his vehicle's lights and followed in pursuit. 2RP 29-

30. The Honda failed to stop at a stop sign, ran through two red lights, and nearly collided with another vehicle. 2RP 30-32. Deputy Rickerson activated his siren as he pursued Sum. 2RP 31. The Honda slid into the front yard of a home as it attempted to negotiate a turn. 2RP 32. Sum jumped out of the vehicle and started running, but he tripped and the deputy was able to take him into custody. 2RP 32. Sum eventually provided his true name and date of birth. 2RP 33-35. Deputy Rickerson observed a black and silver handgun inside the Honda, in front of the driver's seat. 2RP 37. The gun was later recovered pursuant to a search warrant. 2RP 37-39. It was loaded and had three rounds in the magazine and one round in the chamber. 2RP 39.

The State charged Sum with unlawful possession of a firearm in the first degree, attempting to elude a pursuing police vehicle, and making a false or misleading statement to a public servant. CP 23-24. Sum filed a motion to suppress evidence, arguing he was seized when the deputy asked for his identification. CP 7-12. The trial court denied Sum's motion,

finding that because the deputy did not retain Sum's physical identification to conduct the records check, Sum was not seized. CP 89. A jury subsequently convicted Sum of all three charges. CP 51-53.

Sum appealed his conviction for making a false statement and challenged the superior court's order denying his motion to suppress. The Court of Appeals affirmed in an unpublished opinion, finding that Sum was not seized when he provided Deputy Rickerson with a false name and date of birth in response to the deputy's request for identification. *State v. Sum*, No. 53924-1-II, 2021 WL 1382608 (Wash. Ct. App. April 13, 2021) (unpublished).

IV. ARGUMENT

A. There is no basis for review where the Court of Appeals followed well-established law and properly concluded that no seizure occurred when Deputy Rickerson approached Sum's parked vehicle, engaged him in conversation, and asked if he had identification.

Sum was not seized when Deputy Rickerson approached his parked vehicle on foot, asked what he was doing in the area,

and inquired if he had identification. This was a valid social contact. This Court has repeatedly affirmed the principle that an individual is not seized merely because a police officer engages him or her in conversation in a public place and asks for identification. *See State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009) (“[W]e have categorized interactions where officers ask for an individual’s identification as social contact.”); *State v. O’Neill*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003) (“[W]e reject the premise that under article I, section 7 a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a *Terry*² stop.”); *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998) (“[T]he police are permitted to engage persons in conversation and ask for identification even in the absence of an articulable suspicion of wrongdoing.”); *State v. Armenta*, 134

² *See Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Wn.2d 1, 11, 948 P.2d 1280 (1997) (“[A] police officer’s conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.”). This well-established principle applies to Sum’s case.

When considering whether a seizure occurred under article I, section 7 of the Washington Constitution, this Court has continued to apply the same, objective test looking at the totality of the circumstances and the actions of the law enforcement officer to determine if a reasonable person in the defendant’s position would feel he or she was being detained. *See Harrington*, 167 Wn.2d at 663-64; *O’Neill*, 148 Wn.2d at 574, 581; *Young*, 135 Wn.2d at 510-11. This Court has held that the subjective suspicions of the law enforcement officer are irrelevant in determining whether a seizure occurred. *O’Neill*, 148 Wn.2d at 575-77. The law here is well-settled. The Court of Appeals correctly applied the legal standard affirmed by this Court and held that Sum was not seized at the moment he

provided Deputy Rickerson with a false name and date of birth in response to the deputy's request for identification. Sum therefore fails to show that review is warranted under RAP 13.4(b)(3) and (4).³ This Court should deny review.

1. No seizure occurred when Deputy Rickerson approached Sum's parked vehicle, engaged him in conversation, and asked for Sum's name.

Deputy Rickerson's conduct in approaching Sum's parked vehicle, asking him questions, and requesting identification was part of a lawful social contact. "Not every encounter between an officer and an individual amounts to a seizure." *State v. Nettles*, 70 Wn. App. 706, 709, 855 P.2d 699 (1993). This Court has categorized interactions where police request a person's identification as social contacts, and social contacts are not seizures. *Harrington*, 167 Wn.2d at 664-65 (citing *Young*, 135 Wn.2d at 511). Without more, "engaging a defendant in

³ Pursuant to RAP 13.4(b)(3) and (4), this Court will only accept a petition for review if a significant question of constitutional law is involved or if the petition involves an issue of substantial public interest.

conversation in a public place and asking for identification” does not transform the encounter from a social contact into a seizure. *Young*, 135 Wn.2d at 511 (citing *Armenta*, 134 Wn.2d at 11). “While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.” *INS v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984).

In determining whether a seizure occurred in violation of article I, section 7 of the Washington Constitution, courts apply a purely objective standard “‘looking to the actions of the law enforcement officer.’” *O’Neill*, 148 Wn.2d at 574 (quoting *Young*, 135 Wn.2d at 501). “[T]he focus of the inquiry is not on whether the defendant’s movements are confined due to circumstances independent of police action[, such as occupying a parked vehicle,] but on whether the police conduct was coercive.” *State v. Thorn*, 129 Wn.2d 347, 353, 917 P.2d 108 (1996), *overruled on other grounds by O’Neill*, 148 Wn.2d at

571. The defendant bears the burden of proving that a seizure occurred. *O'Neill*, 148 Wn.2d at 574.

Encounters between civilians and police are consensual if a reasonable person would feel free to leave. *Harrington*, 167 Wn.2d at 663-64. Such an encounter may become a seizure, however, if there are several officers present, the officer displays a weapon, the officer physically touches the defendant, or the officer's language or tone of voice indicates mandatory compliance. *Id.* at 664 (citing *Young*, 135 Wn.2d at 512). Without such circumstances, inoffensive contact between the police and a private citizen cannot amount to a seizure of that person as a matter of law. *Young*, 135 Wn.2d at 512 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). Relevant here, no seizure occurs when a lone police officer approaches a parked car, asks an occupant to roll down the window, and asks questions, including the occupant's name. *See, e.g., O'Neill*, 148 Wn.2d at 578-81; *State v. Mote*, 129 Wn. App. 276, 292, 120 P.3d 596 (2005).

The Court of Appeals found that based on the totality of the circumstances, Sum was not seized at the moment he provided a false name to Deputy Rickerson. *Sum* at *4. The deputy's conduct "closely mirror[ed] those cases," such as *O'Neill* and *Mote*, "in which an officer does nothing more than request identification." *Id.* The Court of Appeals' analysis was correct.

In *O'Neill*, a police officer observed a car parked in front of a business that was closed and had recently been burglarized. 148 Wn.2d at 571-72. The officer pulled behind the car, activated his spotlight, and ran a computer check on the license plate. *Id.* at 572. He learned that the vehicle had been impounded within the previous two months. *Id.* The vehicle's windows were fogged over and the vehicle appeared to be occupied. *Id.*

The officer approached the driver's side of the parked vehicle, shined his flashlight on the driver's face, and asked him to roll down the window. *Id.* The driver, later identified as O'Neill, complied. *Id.* The officer then asked O'Neill what he

was doing there, and O'Neill responded that his car had broken down and would not start. *Id.* The officer asked O'Neill to try and start the vehicle. *Id.* O'Neill tried, but the vehicle would not start. *Id.* The officer then asked O'Neill for identification. *Id.* O'Neill responded he had no identification and his license had been revoked, and he gave the officer a name that turned out to be false. *Id.* The officer asked O'Neill to step out of the vehicle, and subsequent events led to O'Neill's arrest. *Id.* at 572-73.

This Court held that under article I, section 7, O'Neill was not seized until he was asked to step out of the vehicle. *Id.* at 574. Before that point, the officer neither used physical force nor displayed any show of authority. *Id.* at 577-81. An officer does not display authority just because he carries a gun, wears a uniform, and asks questions. *Id.* at 581. The Court observed,

It is important to bear in mind that the relevant question is whether a reasonable person in O'Neill's position would feel he or she was being detained. The reasonable person standard does not mean that when a uniformed law enforcement officer, with holstered weapon and official vehicle, approaches and asks questions, he has made such a show of authority as to

rise to the level of a *Terry* stop. If that were true, then the vast majority of encounters between citizens and law enforcement officers would be seizures.

Id. at 581.

Similarly, in *State v. Mote*, 129 Wn. App. 276, 279-80, 120 P.3d 596 (2005), a police officer observed two people sitting in a car parked in a residential neighborhood late at night with its rear and dome lights activated. The officer was driving a fully marked police vehicle and wearing a standard police uniform. *Id.* at 279. “Concerned about drug activity and frequent vehicle prowls in the area,” the officer parked behind the other vehicle, approached the driver’s side, and asked the occupants “what they were up to.” *Id.* at 280. The officer also asked the occupants for identification, and they complied. *Id.* at 280-81.

On appeal, the court held that even assuming the officer used a spotlight when he approached the vehicle, his “actions in their entirety, viewed objectively, did not create such a show of authority that there would be a seizure.” *Id.* at 292 (citing *O’Neill*, 148 Wn.2d at 578-81). The court noted that the officer

did not activate his vehicle's siren or overhead lights, he did not display his weapon or make physical contact with the defendant, he was alone, and he requested, rather than demanded, the defendant's identification. *Id.*

Here, as in *O'Neill* and *Mote*, Sum was not seized when Deputy Rickerson approached his parked vehicle on foot, asked Sum what he was doing, and requested identification. This was a valid social contact. The deputy parked his vehicle so that it was not blocking Sum's vehicle. 2RP 18-19. There is no evidence the deputy activated his vehicle's lights or siren. The deputy did not pull Sum over, but rather approached Sum's vehicle on foot after observing Sum slumped over in the driver's seat. 2RP 17-21. Sum, on his own, partially rolled down his window to speak with the deputy. 2RP 23. *Compare O'Neill*, 148 Wn.2d at 579 (no seizure occurred where officer asked the defendant to roll down his window). Deputy Rickerson then engaged defendant in conversation and asked him what he was doing in the area and to whom the vehicle belonged, just as the officers in *O'Neill* and

Mote asked the defendants what they were doing. 2RP 23, 25. See *O’Neill*, 148 Wn.2d at 572; *Mote*, 129 Wn. App. at 280. Finally, Deputy Rickerson asked Sum if he had identification, and Sum verbally provided a false name and date of birth. 2RP 23, 25-27.

Sum mischaracterizes Deputy Rickerson’s request as a “demand” for information. According to the testimony from the suppression hearing, Deputy Rickerson “asked” Sum if he had identification on him. 2RP 23, 25. The trial court’s written findings of fact reflect that the deputy “inquired” if Sum had identification. CP 86 (Finding of Fact No. 11). Sum has not challenged this finding of fact, and therefore it is a verity on appeal. *O’Neill*, 148 Wn.2d at 571, 578; see *Sum* at *2 n.3. Deputy Rickerson requested Sum’s identification, and no seizure occurs when an officer requests identification. See *O’Neill*, 148 Wn.2d at 577-78.

Moreover, it is Sum’s burden to prove a seizure occurred. He failed to elicit any evidence during the suppression hearing to

support his argument that, for instance, Deputy Rickerson's manner or tone of voice indicated a demand for information. Without evidence of coercion or display of authority, Sum cannot meet his burden. *See, e.g., Thorn*, 129 Wn.2d at 353-54 (defendant failed to show a seizure occurred, where officer's question "Where is the pipe?" was subject to more than one interpretation, and the defendant "presented no facts about the encounter" to show that a reasonable person would not feel free to leave). Sum's argument that Deputy Rickerson "demanded" information lacks evidentiary support and should be rejected.

Sum was not seized until he drove off at a high rate of speed, over grass and the sidewalk, and Deputy Rickerson activated his lights in pursuit. 2RP 28-29. At that point, the deputy had, at a minimum, reasonable suspicion to support a traffic stop. Before Deputy Rickerson activated his vehicle's lights in pursuit of Sum, the officer neither used physical force nor displayed any show of authority. *See O'Neill*, 148 Wn.2d at 577-81.

The factors cited by this Court in *Harrington* support that Deputy Rickerson's initial contact with Sum did not amount to a seizure. *See Harrington*, 167 Wn.2d at 664 (citing *Young*, 135 Wn.2d at 512). Deputy Rickerson was the only officer who initially contacted Sum. There is no indication that the deputy displayed his weapon, physically touched Sum, or used language or tone indicating mandatory compliance. *See* 2RP 17-25. Rather, the deputy "asked" Sum for his name. Without evidence to the contrary, it cannot be said that Deputy Rickerson's initial contact with Sum amounted to a seizure. *Harrington*, 167 Wn.2d at 664; *O'Neill*, 148 Wn.2d at 581.

Deputy Rickerson's actions in their entirety, viewed objectively, did not create such a show of authority as to constitute a seizure. The deputy lawfully approached Sum, engaged him in conversation, and asked for identifying information as part of a social contact. There is nothing in the record that indicates the deputy told Sum to stop or that he was not free to leave or otherwise gave Sum a command or order.

Under *O'Neill* and *Mote*, the deputy's initial encounter with Sum was lawful. Sum was not seized. The Court of Appeals' decision finding the same does not raise a significant question of constitutional law under RAP 13.4(b)(3) and does not involve an issue of substantial public interest under RAP 13.4(b)(4). This Court should deny review.

2. The deputy's subjective suspicions of criminal activity are irrelevant to the Court's seizure analysis.

Sum bases his argument on the premise that he was seized because Deputy Rickerson suspected that he was involved in criminal activity. *See* Pet. Rev. at 13, 15. In doing so, Sum ignores this Court's opinion in *O'Neill*. There, the Court expressly rejected the defendant's argument that an officer cannot question the driver of a vehicle if the officer suspects criminal activity but those suspicions do not rise to the level necessary for a *Terry* stop. *O'Neill*, 148 Wn.2d at 574-75, 577. The Court reasoned, "That premise is...contrary to the principle that a seizure depends upon whether a reasonable person would

believe, in light of all the circumstances, that he or she was free to go or otherwise end the encounter. Whether a seizure *occurs* does not turn upon the officer's suspicions." *Id.* at 575 (emphasis in original). *See also, Young*, 135 Wn.2d at 512-14 (police officer, suspicious of defendant's actions, did not disturb defendant's "private affairs" by shining a spotlight on him as he walked down the street); *Thorn*, 129 Wn.2d at 349, 353-54 (no seizure occurred where police officer, who suspected drug activity, approached defendant's parked car on foot and asked, "Where is the pipe?").

An officer's reasonable suspicions are only relevant once a seizure *occurs* and then inform whether the seizure was constitutionally valid. *O'Neill*, 148 Wn.2d at 576-77. Deputy Rickerson did nothing more than share his suspicions when asked by Sum. Whether or not Deputy Rickerson subjectively suspected Sum of criminal activity is irrelevant to the question of whether a seizure occurred when he asked Sum if he had identification. *See id.* at 575. The reasons behind Deputy

Rickerson's request do not factor into the analysis. Rather, the relevant consideration is the deputy's conduct or any show of authority. *Id* at 576.

Citizens "expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens' questions, comments, and information citizens may offer." *Id.* at 576-77. Deputy Rickerson did what the citizens of this state expect police to do: he checked on the welfare of individuals who appeared to be unconscious, and he engaged one of those individuals – Sum – in conversation and asked for identification when circumstances appeared suspicious. There was no show of authority, and there was no seizure. Review is not warranted.

B. This Court should also deny review, because Sum agrees that adopting a new reasonable “person of color” standard is unnecessary to the determination of his case.

In his petition for review, Sum expressly acknowledges that it is “not necessary” for this Court to adopt a new “reasonable ‘person of color’ standard” to resolve the issue of whether he was seized in this case. *See* Pet. Rev. at 15. The State agrees. Sum cites the objective legal standard articulated by this Court in *Harrington*, *O’Neill*, and *Young* in his petition, and that constitutional standard appropriately, and conclusively, shows no seizure occurred. Because consideration of a new reasonable “person of color” test is unnecessary in deciding Sum’s case, this Court should deny review. *See State v. Hall*, 95 Wn.2d 536, 539, 627 P.2d 101 (1981) (“A reviewing court should not pass on constitutional issues unless absolutely necessary to the determination of the case.”).

Additionally, even if Sum were asking this Court to adopt a new legal standard, doing so would be problematic for at least three reasons. First, Sum’s case is an unsuitable vehicle for

creating and applying such a standard. Sum bears the burden of proving that a seizure occurred. *O’Neill*, 148 Wn.2d at 574. Sum cannot meet his burden to prove a seizure under some new unidentified legal standard that he neither articulates for this Court nor explains how it should apply to the facts of his case.

Second, a reasonable “person of color” standard is inconsistent with the “purely objective” reasonable person test articulated by this Court in *Harrington*, *O’Neill*, and *Young*. See, e.g., *Harrington*, 167 Wn.2d at 663. Federal cases are persuasive on this point. In *United States v. Easley*, 911 F.3d 1074, 1081-82 (10th Cir. 2018), the Tenth Circuit rejected the consideration of a person’s race in a “reasonable person” seizure analysis, noting that that test is an objective one which considers “not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer’s words and actions would have conveyed that to a reasonable person.” (citing *Mendenhall*, 446 U.S. 544).

The *Easley* court noted that consideration of a person's race in the reasonable person analysis is unworkable, because persons of color do not all share the same life experiences, and there is no uniform way to account for such differences when applying an objective test. *Id.* at 1082. The court stated:

Requiring officers to determine how an individual's race affects her reaction to a police request would seriously complicate Fourth Amendment seizure law. As the government notes, there is no easily discernable principle to guide consideration of race in the reasonable person analysis.... There is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population. Thus, there is no uniform way to apply a reasonable person test that adequately accounts for racial differences consistent with an objective standard for Fourth Amendment seizures ... in short, the categorical consideration of race in the reasonable person analysis is error, and we reject Ms. Easley's argument to the contrary.

Id. at 1082.

Sum cannot inject his race or his subjective perceptions as a person of color in the analysis, because both the Fourth Amendment and article I, section 7 require viewing Deputy Rickerson's conduct in light of a reasonable person, not a

reasonable person of color. *See also, Torres v. Madrid*, ___ U.S. ___, 141 S. Ct. 989, 998-99, 209 L. Ed. 2d 190 (2021) (“[T]he appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain...Only an objective test ‘allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.’”) (emphasis in original)(internal citations omitted); *United States v. Knights*, 989 F.3d 1281, 1288 (11th Cir. 2021)⁴ (“We may not consider race to determine whether a seizure has occurred,” because “the existence of a seizure is an objective question,” and “most personal characteristics, including race, do not lend themselves to objective conclusions.”).

Applying different reasonable person standards to different groups of people on the basis of race is not only unworkable, but also “raises serious equal protection concerns if it could result in different treatment for those who are otherwise

⁴ *Petition for Certiorari Docketed*, United States Supreme Court No. 21-198.

similarly situated.” *Easley*, 911 F.3d at 1082; *see also Knights*, 989 F.3d at 1289 (“[E]ven if we could devise an objective way to consider race, we could not apply a race-conscious reasonable-person test without running afoul of the Equal Protection Clause.”).

Third, the record here is insufficient for consideration and application of a new legal standard based on race. The *Easley* court noted that particular personal traits of a defendant are irrelevant to the Fourth Amendment’s reasonable person test “other than to the extent that they may have been known to the officer and influenced *his conduct*.” 911 F.3d at 1081 n.3 (emphasis in original) (citing *United States v. Little*, 18 F.3d 1499, 1505 (10th Cir. 1994)). Thus, Sum’s race would only have been potentially relevant to the court’s seizure analysis if his race was known to Deputy Rickerson at the time of his contact and influenced the deputy’s actions.

The record from the suppression hearing is completely silent as to Sum's race.⁵ There is no evidence as to what the deputy knew, or believed, Sum's race to be. As the appellant, Sum bears the burden of perfecting the record for appellate review. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d (2012); *see* RAP 9.2(b). Sum did not develop the necessary record below. He never argued to the trial court or to the Court of Appeals that under a reasonable "person of color" standard, he was seized. Rather, he relied on existing Washington caselaw and this Court's objective legal standard. *See* CP 7-12; 2RP 44-45; Brief of Appellant (COA 53924-1-II) at 9-20. In the absence of a sufficient record, this Court would be left speculating as to how, if at all, Sum's race affected the deputy's conduct. For the above reasons, this Court should deny review.

⁵ The judgment and sentence lists Sum's race as "Asian/Pacific Islander." CP 65.

V. CONCLUSION

Sum fails to show review is warranted under RAP 13.4(b)(3) and (4). For the reasons set forth above, the State respectfully requests this Court deny review.

This document contains 4993 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 1st day of October,
2021

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PIERCE COUNTY PROSECUTING ATTORNEY

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